2013 WL 2367438 (Ga.) (Appellate Brief)
Supreme Court of Georgia.

Henry G. JOHNSON and Kendall Hash, Appellants,
v.
Donna Ellis BURRELL, Appellee.

No. S13A0728.
May 24, 2013.

Brief of Appellants, Henry G. Johnson and Kendall Hash, Subsequent to Oral Argument

***2** The appellants submit this brief to more fully respond to questions posed by the court, at oral argument, address misrepresentations made by opposing counsel, and clarify various matters which are central to resolution of this appeal.

1. The decisions cited by Justice Blackwell are not relevant to the issue of whether the rebuttable presumption of undue influence is presented in the case *sub judice.*

"A rebuttable presumption of undue influence arises when a beneficiary under a will occupies a confidential relationship with the testator, is not the natural object of his bounty, and takes an active part in the planning, preparation, or execution of the will". *Bailey v. Edmundson,* 280 Ga. 528, 529 [citing *McConnell v. Moore,* 267 Ga. 839, 840]. Justice Blackwell, presumably unconvinced the record would support a finding that Ms. Burrell participated "in the planning, preparation or execution of the will", observed:
In Lawson we said that contacting an attorney for the testator at the testator's direction is not enough. That's not enough of an active part in the planning, preparation or execution of the will to give rise to the ***3** presumption.

In the *McWilliams* case and the *Lipscomb case,* we found that paying the lawyer was not enough.

Do you have a case that says making the call plus paying the lawyer together is enough?

Counsel for appellants conceded he had no such authority, though he respectfully argued the probate court, upon consideration of "all of these factors" surrounding the "planning, preparation [and] execution of the will", "should have submitted that issue to a jury", with appropriate instructions. *E.g., White v. Regions Bank,* 275 Ga. 38 (failure to instruct jurors undue influence could be presumed, if they found a confidential relationship existed, was reversible error).

The rebuttable presumption was not an issue in Lawson v. Lawson, 288 Ga. 37, *Lipscomb v. Young,* 284 Ga. 835, or *Pope v. McWilliams,* 280 Ga. 741, as the propounder, in each of those cases, was a natural object of the testator's bounty. The caveators in these cases would not, consequently, have been entitled to the rebuttable presumption, even if the beneficiaries had actively participated in the planning, preparation or execution of the will.

The beneficiary in Lawson, the testator' s son, contacted an attorney, at the testator' s direction, and thereafter drove the testator to the lawyer's office. The terms of the will, which was executed in June 2004, "were substantially the same as those earlier wills and another one executed by the testator in 1980". The testator died in December 2005 and it was undisputed that the caveator, who was also the testator' s son, was estranged from his father.

The beneficiary in *Lipscomb*, a daughter of the testator, drove her mother to an appointment "at which the will was drafted and executed, was present at its execution, and paid for the will with cash that testator had given her". The will was executed in April 2004, and the testator died in June 2007. There was, in that case, ***4** "no evidence that appellee had any involvement in the decision to create the will or any input into its contents".

The testator in *Pope v. McWilliams* left his real property to his sister, McWilliams, whose "two sons had farmed [his] land for about 15 years prior to [his] death", and the remainder of his estate to his brother, a niece, and the caveator, a nephew. McWilliams drove the testator to her attorney's office and paid the attorney with a check drawn on a joint account she maintained with the testator. The caveator did not have standing to invoke the rebuttable presumption, as this court found McWilliams "was a natural object of Grigsby's estate". [1]

These decisions are, however, instructive in evaluating whether there is sufficient evidence of Ms. Burrell having participated in the making of the will to submit that issue to the jury. The testator, in *Harper v. Harper*, 274 Ga. 542, "devised and bequeathed the majority of his estate to... one of his three surviving sons". One of the other sons challenged the will, alleging he had been disinherited because the beneficiary's son had "misled [the testator] into believing that Caveator stole a large sum of money which Testator had buried in his yard".

The grandson drove the testator to the office of his attorney, where the will was executed. This court held "provision of transportation for his **elderly** grandfather, **without more, 'is not evidence of his undue influence** over [Testator], since it is undisputed that on no occasion did he take an active part in any testamentary planning or the execution of the will itself"'. 274 Ga. at 546 (emphasis added) [citing *McConnell v. Moore, supra*, 267 Ga. at 840]. The testator, rather than the grandson, called the attorney who prepared the will, and "[t]here [was] no evidence that Grandson ever encouraged Testator to change his will or that he arranged for the execution of the new instrument". *Id.*

***5** Establishing undue influence, as the caveators attempted to do in *Lawson v. Lawson*, *Lipscomb v. Young*, and *Pope v. McWilliams*, is much more demanding than establishing a beneficiary participated "in the planning, preparation or execution of the will". Ms. Burrell arranged for the decedent's will to be executed, by calling his attorney, after he confided in her that she was not, contrary to her belief, the beneficiary of his will. The appellants submit this is, without more, sufficient evidence to present a jury issue, as the decedent, at that point, was physically unable to make the call.

Counsel for the appellants, arguing the probate court erroneously decided questions of fact, observed:
If the appellee does not make that telephone call, with that man in the condition he was in, then we're not here.

There is no will. He was unable to use the phone. He was unable to get up.

Likewise, Ms. Burrell remaining with the decedent, at his residence, until the attorney arrived, returning to the residence, after the initial meeting, and remaining until the attorney returned with his two employees, is sufficient evidence to present a jury issue. The fact that Ms. Burrell paid the attorney would also be sufficient to present a jury issue. All factors considered together certainly authorize a charge on the rebuttable presumption of undue influence.

2. The question of whether a beneficiary participated in the making of a will is a mixed uestion of law and fact.

Justice Blackwell observed and asked: "Certainly the ultimate question of undue influence would be one for a jury, if you get to a jury, but whether the presumption arises - - is that a question of law or fact?"

Counsel for the appellants responded:

> I submit that the trial court should have submitted the question and ***6** charged the jury that they are to decide if she participated. [The probate court] decided it as a matter of law.

Counsel for the Ms. Burrell addressed the issue, asserting: “The rebuttable presumption, respectfully, is a matter of law”.

The appellants, consistent with counsel's contention that the issue must, when supported by evidence, be presented to the jury, contend whether the rebuttable presumption arises is a mixed question of law and fact. While the court may determine whether a beneficiary is a natural object of the testator' s bounty as a matter of law, “[t]he determination as to whether a confidential relationship exists as defined by OCGA § 23-2-58 is a question for the trier of fact, and if there is any evidence to support the trier of fact's determination, the trier of fact's decision on the matter will be affirmed”. *Stamps v. JFB Properties, LLC,* 287 Ga. 124, 126 (answering certified question from United States District Court for the Northern District of Georgia) (citations omitted). See also, *Bean v. Wilson,* 283 Ga. 511 (whether live-in caregiver occupied confidential relationship with testator was question for jury); *Trotman v. Forrester,* 279 Ga. 844 (jury was authorized to find confidential relationship between testator and testator's son). Likewise, the determination as to whether a beneficiary “[took] an active part in the planning, preparation, or execution of the will” is a question of fact whenever there is any evidence that the beneficiary was involved “in the planning, preparation, or execution of the will”.

3. Ms. Burrell acknowledged she telephoned Mr. Reynolds.

Mr. Fields informed the court Mr. Reynolds “didn't remember who called him” to request that he come to the decedent's residence, so that he could change his will, on May 28, 2009.[2] This is not an issue, as Ms. Burrell acknowledged she made ***7** the call to Mr. Reynolds (R-95).

4. A jury issue would be presented, on the question of undue influence, even if the appellants did not enjoy the rebuttable presumption of undue influence.

Opposing counsel argued: “Absent a rebuttable presumption, then there is no way they succeed”, and further asserted: “[W]ithout a presumption of undue influence, you cannot have this case have a fact question that could go anywhere”.

The question of undue influence is generally for the factfinder. *Mathis v. Hammond,* 268 Ga. 158, 160 [citing *Wheeler v. Rowell,* 234 Ga. 403]. This court, in both *Davison v. Hines,* 291 Ga. 434, 437, and *Bailey v. Edmundson, supra,* 280 Ga. at 530, held the evidence presented was sufficient to support the finding of undue influence, “even if no rebuttable presumption of undue influence could be shown”.

Ms. Burrell emphasizes the appellants concede they have no direct knowledge of undue influence. This is, contrary to the assertions of opposing counsel, not fatal to their caveat.

> An attack on a will as having been obtained by undue influence may be supported by a wide range of testimony, since such influence can seldom be shown except by circumstantial evidence. Thus, a confidential relation between the parties, the reasonableness or unreasonableness of the disposition of the testator's estate, old age, or disease affecting the strength of the mind, tending to support any other direct testimony or any other proved fact or circumstance going to show the exercise of undue influence on the mind and will of the testator, are relevant. While the quantity of influence varies with the circumstances of each case, according to the relations existing between the parties and the strength or weakness of mind of the testator, the amount of influence necessary to dominate a mind impaired by age or disease may be decidedly less than that required to control a strong mind.

***8** *Skelton v. Skelton,* 251 Ga. 631, 634 [citing *Fowler v. Fowler,* 197 Ga. 53, and *Perkins v. Edwards,* 228 Ga. 470, 475].

Counsel for the appellants stated:

> In the case law and in the hornbooks there are ten or twelve, fifteen different ways in which caveators can show undue influence. In the record, we have shown eleven different matters. We have shown the testator' s dealings with the beneficiary; we have shown their habits, their motives, their feelings; we have shown a confidential relationship between the appellee [ ] and Mr. Johnson; and, we think, that, with all due respect, that this - what we have shown in the record - that because of this confidential relationship there is a presumption of undue influence and there is a presumption of undue influence because of the three-pronged test the court has laid out in many decisions about what you have to show in order to get that.

Counsel for appellants subsequently returned to the issue of undue influence, separate from the rebuttable presumption.

> None of our ten or twelve things, in and of themselves, would overturn this will. But when you take them together and cumulatively, we have a jury question on the issue of undue influence. [3]

Ms. Burrell, who had the decedent's power of attorney (R-89-90), prepared a living will for him (R-93), and frequently paid bills for him (R-127), has acknowledged a confidential relationship with the decedent ("brief of appellee", p. 23). Evidence of a confidential relationship between the testator and the beneficiary will support a finding of undue influence. *Trotman v. Forrester, supra,* 279 Ga. at 844-845.

***9** Opposing counsel contends the decedent, in executing the will submitted for probate, "continued a pattern of simply swapping the two [beneficiaries]". This fact, as previously noted by the appellants, is relevant to the issue of undue influence, insofar as the decedent changed his will, to leave everything to Ms. Burrell, who would have received nothing under his previous will, and nothing to Dr. Hash, who would have been the beneficiary of his entire estate, less than one month prior to his death. *E.g., Jones v. Sperau,* 275 Ga. 213; *Knox v. Knox,* 213 Ga. 677.

This court has, of course, recognized "the amount of influence necessary to dominate a mind impaired by age or disease may be decidedly less than that required to control a strong mind". *Bailey v. Edmundson, supra,* 280 Ga. at 531 [citing *Dyer v. Souther,* 272 Ga. 263, 264-265]; *Murchison v. Smith,* 270 Ga. 171, 172 [citing *Skelton v. Skelton, supra,* 251 Ga. at 634]. The decedent was extremely old (96) and ill on May 28, 2009. Rosa Fowler confirmed the decedent, after he was discharged from the hospital on May 8, 2009, "was frequently out of breath and sometimes disoriented" (R-662). The decedent did not recognize his son, Mr. Johnson, when he last visited him a few weeks before his death (R-365-367). Dr. Hash testified the decedent "was not able to hear [her] or to see very well, could not get to a standing position without help, could hardly talk because he couldn't breathe" (R-268; see also, R-287), the last time she saw him, which was only two days after he executed the will on May 28, 2009. [4] Dr. Sibley stated the decedent was on oxygen, and "could not stay awake, was unable to get out of the bed without assistance, and could not communicate with [Dr. Sibley and his family]" (R-688-689), when he last visited him on May 31, 2009.

Ms. Burrell's business relationships with the decedent would further support ***10** a finding of undue influence. She never made any lease payment to the decedent, even though she was obligated to pay $4,000 a year in rent (R-117). Additionally, the decedent informed Dr. Sibley he had sold his livestock to Ms. Burrell and her husband, "but they [had] failed to pay him for the cattle" (R-686). [5]

The affidavit of Dr. Goff confirms Ms. Burrell conducted the decedent's business affairs prior to execution of the subject will. Dr. Goff testified the decedent "was bed-ridden", and that each of the several meetings in the spring of 2009 were held "at his bedside". Ms. Burrell, on those occasions, "did all of the talking" (R-665).

Opposing counsel asserted the probate court properly considered the testimony "of the people who saw [the decedent] the most, in the month of May". [6] The affidavit of Rosa Fowler is not mentioned in the "brief of appellee", nor was the affidavit discussed during opposing counsel' s argument to the court. This is not surprising, as Ms. Fowler, who saw the decedent all day, one day

a week, as she had for more than 20 years, testified Ms. Burrell "was almost always at [the decedent's] house, sometime during the day, when [she] was at the residence during the last two or three months of his life" (R-662), and further testified Ms. Burrell **"seemed to take control of [the decedent's] affairs"** after he was discharged from the hospital on May 8, 2009 (R-661). [7] Ms. Burrell "placed a lock on the gate to the property, which had to be opened any time [Ms. Fowler] went to the residence" (R-662).

Ms. Burrell testified the decedent was unable to drive, "[p]robably the beginning of May" (R-75). Ms. Fowler confirmed the decedent was, after he ***11** returned from the hospital in May 2009, dependent upon Ms. Burrell for transportation (R-661).

Ms. Burrell "was apparently designated to [e-mail]" for the decedent in the last weeks of his life, as he was unable to "sit at the computer" (R-293), and assisted the decedent with his medications, because he had "been getting his medications mixed up" (R-661). Ms. Burrell, two days before the decedent's will was changed, e-mailed Dr. Hash to inform her the decedent "is pretty weak right now", and that the nurse "believe[d] he [was] weak from not eating and drinking much due to his nausea" (R-302; see also, R-600).

The probate court found "no evidence that Donna Burrell isolated Mr. Johnson from his family, over-medicated him, or deceived him" (R-697). This conclusion is inconsistent with the evidence, as Dr. Sibley testified Ms. Burrell "would invariably drive up to [the decedent's] house on those Sundays" he and his wife visited, and would remain until they left, even though she "would tell [them] she could only stay for 'a little while"' (R-685). [8]

Additionally, the events of May 28, 2009 are sufficiently questionable to raise an issue of undue influence. The decedent, on that date, notified Ms. Burrell she was not, contrary to her understanding, the beneficiary of his will. **Ms. Burrell thereafter called Mr. Reynolds, from the decedent's residence, to make arrangements to have the will changed, to name her as the beneficiary, was present at the decedent's residence when Mr. Reynolds arrived, returned to the decedent's residence after he initially met with Mr. Reynolds, and remained until Mr. Reynolds returned with the two employees who witnessed the will, which left the decedent's entire estate to her, and subsequently filled out the check to pay Mr. Reynolds' law firm for preparing the will.** The fact that Ms. ***12** Burrell was skulking about the home of a dying man, who had less than one month to live, until he had changed his will to name her as beneficiary, is certainly relevant to the issue of undue influence.

5. The probate court erred in disregarding Dr. Hash's affidavit.

Opposing counsel referenced the affidavit of Dr. Craig Mitchell, in which that physician asserted the decedent was, on May 29, 2009, "mentally competent to understand his affairs, understand the properties and assets that he owned, and to make a conscious and sound decision honoring his sole wishes as to the disposition of the same" (R-635).

This court, reviewing the grant of a motion for summary judgment, must "view the evidence and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant". *Cowart v. Widener*, 287 Ga. 622, 624 [citing *Kaplan v. City of Sandy Springs*, 286 Ga. 559, 560] Thus, the only medical evidence in the record, which can be considered by this court, is the affidavit of Dr. Hash, [9] who confirmed "[h]ealth care providers have long recognized the correlation between CHF and cognitive impairment" (R-669). Dr. Hash explained "[c]ognitive function is further diminished with end-stage CHF, as the flow of oxygen typically decreases significantly in the last weeks immediately prior to a patient's passing" (R-670).

Dr. Hash' s affidavit is not, however, essential to establish the decedent's mind was weak and that he was susceptible to undue influence, as her observations, those of her father, the affidavit of Rosa Fowler, and Mr. Johnson' s last encounter with the decedent conflict with the affidavits presented by Ms. Burrell. This presents an issue of fact, which cannot be resolved on motion for summary judgment.

6. Opposing counsel, responding to a question from the court about the ***13** decedent's relationship with Len Burrell, incorrectly stated "any friction over that had abated, and **that is undisputed**".

Presiding Justice Hines asked Mr. Fields:

> [T]he question about Mr. Burrell and the beneficiary of the will, Donna, their relationship, was it known that Mr. -- that the testator had a -- did not like this gentleman and is there anything to show that that relationship was hidden from him for any reason? Because it does -you know, married on the day of the propounding of the Will, I mean-

Opposing counsel responded:
Ms. Ellis testified that Mr. Johnson was aware they were living together and doing marriage -- they were living together. I'm not sure about the marriage counseling; I know they did it. [10]

The concern that Mr. Reynolds spoke of wasn't -- Mr. Hubert Johnson never told Mr. Reynolds he hated or as said awhile ago Mr. Burrell that's not true. What he said was Mr. Burrell had been married four times. He thought Ms. Ellis could do better. That worried him. That -- that was the only thing that ever got in there. It is in the record and undisputed that there was this little -- they were great friends, he gave him stuff, then Mr. Burrell got a job off the farm where Ms. Ellis started trying to run it, and he kind of made comments about that, but the comments is un -- it's clear that by 2009 any -- any friction over that had abated, and that is undisputed. They seek to dispute that by hearsay, which the Probate Court, Judge Stephenson, correctly ignored. Opposing counsel asserted the decedent and Mr. Burrell "were great friends".

***14** This is certainly not an accurate description of the decedent's relationship with Mr. Burrell as of May 28, 2009, and the statement that "any friction over that had abated" is patently incorrect. No one, including Ms. Burrell, testified the decedent and Mr. Burrell had reconciled prior to the decedent's passing. Indeed, Ms. Burrell acknowledged the decedent, "sometime in 2008" (R-55), [11] informed her he "didn't want Burrell coming to his house" (R-56), and he "didn't want anything to do with [Mr. Burrell]" (R-57). Mr. Reynolds testified the decedent did not, at any time, indicate his feelings for Mr. Burrell had changed (R-207), and confirmed "[t]e last two or three wills doesn't mention Mr. Burrell at all, to the best of my knowledge" (R-235).

The last statement the decedent made about Mr. Burrell was on May 17, 2009, when he told Dr. Sibley: "The biggest mistake I ever made was giving Len that house and piece of land". The decedent, on that same day, informed Dr. Sibley Burrell had stolen guns from him, and that he suspected Burrell planned on taking his guns when he passed away (R-686).

7. Opposing counsel is incorrect in asserting the probate court properly excluded the testimony of Henry G. Johnson and Dr. Sibley.

Mr. Fields, citing *Harper v. Harper, supra,* argued the decedent's statements to Pete Johnson and Dr. Sibley were properly excluded by the probate court, as "statements by the testator cannot be used to invalidate a will on the grounds of fraud and undue influence". The appellants respectfully maintain a closer reading of *Harper* does not support exclusions of the statements in question. [12] From the opinion:

***15** [T]he declarations of a testator, where the issue is of fraud or undue influence in the execution of a will, are not admissible to prove the actual fact of fraud or the exercise of an improper influence by another... As to the facts themselves, such declarations amount to no more than hearsay evidence; and to permit a person to destroy, annul and revoke a will voluntarily and solemnly executed, by mere oral declaration contrary to the testamentary scheme expressly declared in a written instrument, is to overturn and destroy one of the most salutary of the elementary rules of evidence.

274 Ga. at 545 [citing *Mallory v. Young*, 94 Ga. 804, 807-808].

The admission of statements made by the testator, which established he "made gifts and loans" to the primary beneficiaries of his will, whom he "met at a church which he had recently begun attending", "in the hope of helping himself go to heaven", was affirmed in *Bailey v. Edmundson, supra.* The testator further advised others he was dependent upon these individuals "for personal and medical care; that he was afraid that they would quit and that his daughter would put him into a nursing home; and, that because of them he stopped permitting her to visit him". This court recognized "such declarations are admissible 'for the purpose of showing the state of the testator's mind, and that he was in a position to be easily influenced"'. 280 Ga. at 530 [citing *Reid v. Wilson,* 208 Ga. 235, 237].

The decedent informed Mr. Johnson "Burrell doesn't live here anymore" (R-366), and made statements to Dr. Sibley which convinced him the decedent did not believe Mr. Burrell was living on the property (R-686). Both statements are relevant and admissible as a statement of "then existing state of mind" [OCGA § 24-8-803(3)], and because the decedent is unable to testify. OCGA § 24-8-804(a)(4).

8. The appellants are entitled to the rebuttable presumption of undue influence.

Ms. Burrell was not the natural object of the decedent's bounty, and has ***16** conceded, *in judicio,* the existence of a confidential relationship. [13] Thus, the appellants would be entitled to the rebuttable presumption of undue influence should the evidence establish Ms. Burrell actively participated in the planning, preparation and execution of the will submitted to probate.

Ms. Burrell contends the appellants are not entitled to the rebuttable presumption, as there is no evidence that the appellee actively participated "in the planning and securing and execution of the will". [14] Opposing counsel, citing *Bailey, Harper, and Smith v. Liney,* 280 Ga. 600, seemed to argue the beneficiary must be present at the execution of the will for the rebuttable presumption to arise.

This court, in *Smith v. Liney,* recognized "no presumption of undue influence arises in this case, as the evidence shows that Liney was the natural object of Scherzer's bounty". 280 Ga. at 602. *Harper v. Harper* is likewise inapposite, as the beneficiary was the son of the decedent. [15]

The beneficiaries in *Bailey v. Edmundson* "were actively involved in almost every aspect of the procurement of the [ ] will". 280 Ga. at 529. The propounder "contacted her own attorney, wrote out an agenda for the first meeting at Testator' s home, participated in the meeting along with [another beneficiary of the contested will], and assisted Testator in writing the check to pay the attorney". *Id.* The will was executed on August 20, 2004, and the testator passed away on September 9, 2004.

Mr. Fields, in addressing this issue, inaccurately described the events of May 28, 2009:

> ***17** The testimony at -- in this case is that on the day Mr. Johnson said call my attorney, I need to make some changes, that's it. A call was made. **After that, she was told he was going to change the will.** She never encouraged, never said anything about it, there is a total absence of evidence on that.

The fact that the Ms. Burrell was not present in the decedent's home, when he changed his will, to leave his entire estate to her is not particularly significant, as she was intimately involved in the making of the will. The decedent advised Ms. Burrell "he was not certain about things and he had changed the will to Kendall and now he was changing it back to [her]" (R-99; see also, R-94). [16] Ms. Burrell, **who had been completely disinherited less than one year before the decedent's death,** [17] thereafter telephoned Mr. Reynolds, who twice visited the decedent on May 28, 2009. Ms. Burrell remained with the decedent, until Mr. Reynolds arrived, and returned to the decedent's residence, after he departed. Ms. Burrell remained with the decedent until Mr. Reynolds returned with the two attesting witnesses.

The record establishes Ms. Burrell was personally involved in the planning (the decision to change the beneficiary from Dr. Hash to herself), preparation (she contacted the attorney and filled out the check to pay the fee for this service), **and** the execution of the will (awaited Mr. Reynolds, returned to the residence after he initially met with the decedent, and remained at the residence until he returned with the two employees who witnessed the will). [18] Thus, this case must be remanded, ***18** with instructions to charge the jurors undue influence should be presumed, if they find Ms. Burrell participated in the making of the will.

9. A jury issue is presented on the appellants' claim that the will was the product of false representations.

The probate court, as set forth above, found "no evidence that Donna Burrell isolated Mr. Johnson from his family, over-medicated him, or deceived him" (R-697). This ruling was erroneous, as the evidence establishes two separate misrepresentations which would authorize a verdict invalidating the will.

Counsel for the appellants, in summarizing the grounds supporting the claims of fraud, asserted evidence was admitted into the record which would support the conclusion that Ms. Burrell concealed the fact that she was living with Mr. Burrell, and further convinced the decedent she would never sell the property.

Counsel stated:
Mr. Johnson disliked very much Burrell and he didn't want Burrell to have his land, and he didn't want Ms. Donna Ellis to marry him. He also didn't want his farm sold. He wanted to keep it, he wanted to maintain it and he told Mr. Reynolds every time he would change his will, that it had something to do with that.

So with respect to our fraud claim, Donna Burrell kept from Mr. Johnson the fact that she was living with Burrell. She told or let Mr. Johnson think she would never sell the property. However, a couple of weeks before he made the will, she met with some pecan buyers, pecan land buyers, to negotiate a sale of the property, unknown to Mr. Johnson.

And lastly, we have in the evidence that Donna Ellis married Burrell on the day after Mr. Johnson died. Now the fact that - the trial court made a finding of fact that Mr. Johnson knew that, but that is incorrect. It is ***19** not in the record. It was unknown by Mr. Johnson that she was going to marry Burrell and the trial court made an error in making that finding of fact. [19]

(A) Ms. Burrell persuaded the decedent she was no longer living with Mr. Burrell.

Mr. Reynolds recalled the decedent "questioned [Ms. Burrell' s] judgment a little bit about Lynn Burrell" (R-187-188; see also, R-191), and more specifically, "express[ed] some concern [ ] about Donna's choice of Burrell... [as] a life partner" (R-190-191).

Ms. Burrell acknowledged the decedent, "sometime in 2008" (R-55), informed her he "didn't want Burrell coming to his house" (R-56), and he "didn't want anything to do with [Mr. Burrell]" (R-57). The decedent informed Dr. Sibley Mr. Burrell had stolen some rifles from him, and suspected Mr. Burrell intended to take additional weapons when he passed away, when Dr. Sibley and his wife visited him on May 17, 2009. The decedent further informed Dr. Sibley: "The biggest mistake I ever made was ivin Len that house and iece of land".

The decedent's statements to Dr. Sibley convinced Dr. Sibley he did not believe Mr. Burrell was living on the property on that date (R-686). The decedent advised Mr. Johnson: "Burrell doesn't live here anymore" (R-366), when he visited the decedent a few days later. [20] This conclusion is supported by the affidavit of Dr. Goff, who testified Mr. Burrell did not attend any of the meetings with Ms. Burrell and the decedent until May 11, 2009, on which date they discussed "purchasing a portion of Haywire Farms" (R-665).

Jurors would be astonished to learn the Burrells were married on June 22, ***20** 2009 (R-52), the same day the will was submitted for probate (R-3-5; R-386-388). [21] It is unlikely that Ms. Burrell would have married her husband had the decedent survived, and it is inconceivable that the decedent would have left his entire estate to someone who was living with a man he hated and suspected of stealing from him. The appellants contend, and the evidence establishes, Ms. Burrell concealed her relationship with Mr. Burrell from the decedent, with the intention of **exploiting** his fears, affections and sympathies. OCGA § 53-4-12.

(B) Ms. Burrell convinced the decedent she would not sell or subdivide his farm, even though she was negotiating for the sale of a portion of the farm prior to his death.

Mr. Reynolds discussed the decedent's motivation for leaving his estate to Ms. Burrell. That gentleman testified:

> He consistently indicated to me whenever he was changing to Donna, that he loved his farm and he felt like Kendall was well fixed, she was a doctor -- seems to me that her husband was a doctor, but in any event, they were well off **financially** -- that if she inherited his place, she would undoubtedly sell it. And he felt like that Donna, on the other hand, enjoyed the place, would keep it and -- possibly. I mean he was aware that she wasn't restricted in the sale of it. And that seemed important to him. He didn't have anybody that was really dependent on him. And he loved his farm, and that seemed to be his motivation, as he expressed it to me.

(R-178-179). The decedent expressed that sentiment “anytime there was a will change to Donna” (R-179).

Dr. Goff's affidavit confirms he and Jim Graves met with the decedent and ***21** Ms. Burrell “several times in the spring of 2009”, during which Ms. Burrell “did all of the talking”. [22] Mr. Burrell was not present during these negotiations, and “[t]here was never a proposal of purchase of any of [the decedent's] pecan groves”.

Dr. Goff and Jim Graves met with Ms. Burrell and Mr. Burrell on May 11, 2009, at which time they discussed “purchasing a portion of [the decedent's] property”. Dr. Goff and Jim Graves proposed a seven-year lease, with an option to purchase the property, for $2,500 per acre or “some equivalent number of shares [in their business] at the conclusion of four years”. [23] The decedent “was not present at this meeting” (R-665), and this was the first occasion Mr. Burrell “had ever been present in the discussion of lease and/or sale of [the decedent's property]” (R-666).

The decedent, according to the testimony of Mr. Reynolds, changed his will to leave the farm to Ms. Burrell because he believed she “would keep it” (R-178). The fact that Ms. Burrell was considering selling a portion of the decedent's beloved “Mother Haywire”, three days after he was released from the hospital, and less than six weeks prior to his death, confirms she had no intention of preserving the integrity of that property.

Footnotes

1 The will was executed on April 14, 2004, exactly six months prior to Grigsby's death.

2 Mr. Reynolds did, however, concede the decedent, “at that stage”, “probably needed some assistance in dialing” (R-198).

3 Nine factors which would support a finding of undue influence are set forth in the “reply brief of appellants, Henry G. Johnson and Kendall Hash” (pp. 11-15).

4 “Testimony relating to a reasonable period of time before and after the execution of the will may be introduced to show the testator's state of mind at the time of execution”. *Bishop v. Kenny*, 266 Ga. 231 [citing Estes v. Perkins, 239 Ga. 636].

5 The decedent, on May 17, 2009, instructed Dr. Sibley to contact Mr. Reynolds to obtain “the key to [his] safety deposit box” (R-686) and to “introduce” himself (R-687), which suggests the decedent understood Dr. Hash, who is Dr. Sibley's daughter, was the beneficiary of his estate.

6 The only day Mr. Reynolds saw the decedent was on May 28, 2009, and Dr. Mitchell saw Mr. Johnson on May 12, 2009 and again on May 29, 2009 (R-631-635).

7 The decedent “had an oxygen tank when he was discharged from the hospital”. Ms. Fowler recounted one occasion when a family Ms. Burrell had met at a church she was attending visited the decedent. Ms. Burrell, on that occasion, “turned off the oxygen machine, while she was videotaping the family visiting with [the decedent]” (R-662).

8 Ms. Burrell's decision to place a lock on the gate to the property is further evidence that she sought to isolate the decedent.

9 The probate court, citing *Prophecy Corporation v. Rossignol*, 256 Ga. 27, concluded the affidavit of Dr. Hash, “a dermatologist”, “does not amount to a judiciable dispute” “in the face of [the decedent's] treating cardiologist testimony to the contrary” (R-695).

10 There is no evidence whatsoever that the Burrells were in counseling.

11 The will executed on June 30, 2008 left the entire estate to Dr. Hash (R-193-196; R-588-591; R-637).

12 The superior court apparently excluded the testimony of several witnesses, who “testified as to what Testator told them that Grandson told them about Caveator and the purchase of trucks”. These declarations would have presumably supported the allegation that the testator' s grandson had convinced him “Caveator stole a large sum of money which Testator had buried in his yard”.

13 “The condition of a confidential relationship does exist with Testator as Testator gave Appellee Ellis a Power of Attorney” (“brief of appellee”, p. 23).

14 The probate court concluded the rebuttable presumption “arises [only] if it is shown that the Will was made at the request of [the beneficiary]. Mr. Johnson had Donna Burrell call his attorney, but there is no other evidence in the record that Burrell participated in the making of this Will” (R-697).

15 The rebuttable presumption of undue influence is not, as discussed hereinabove, available to a caveator challenging a will on grounds of undue influence, when the beneficiary is a natural object of the testator's bounty.

16 The decedent had not, prior to that time, told Ms. Burrell he had changed his will, to leave the farm to Dr. Hash (R-96) in 2008 (R-193-196; R-588-591; R-637), the same year he informed her he “didn't want Burrell coming to his house” (R-56), and he “didn't want anything to do with [Mr. Burrell]” (R-57).

17 The decedent was not estranged from Dr. Hash, who was communicating with Dr. Mitchell (R-291; R-297-298), discussed that physician's recommendations with the decedent (R-297), encouraged him, “in [her] most polite way”, to make arrangements with “Hospice or some care centers or someone to come and help him to get through the day and survive and -- sleep and not fall and -” (R-298), and made arrangements to visit the decedent, with her husband and children, a few weeks prior to his passing (R-269).

18 The beneficiary need only “take[] an active part in the planning, preparation, or execution of the will”. Bryan v. Norton, supra, 245 Ga. 347, 348 (emphasis added).

19 The probate court concluded, with no foundation in the record, Ms. Burrell testified the decedent “knew of the upcoming marriage” (R-695).

20 Dr. Sibley called Mr. Johnson, the day after he visited the decedent on May 17, 2009, to suggest that Mr. Johnson visit the decedent (R-687). Mr. Johnson testified Dr. Sibley called him, a few weeks before the decedent's death, to notify him the decedent “wanted to see him” (R-350; see also, R-338-339, R-368).

21 The probate court, as set forth above, incorrectly stated the decedent “knew of the upcoming marriage, which took place on Donna Burrell's birthday” (R-694).

22 These discussions took place beside the decedent's bed, as “[he] was bed-ridden”.

23 The probate court's finding that there is “no credible evidence that this purported offer was accepted or even received by Mr. Johnson or Donna Burrell” (R-694) verifies Dr. Goff's affidavit was not considered, as Dr. Goff testified the memo attached to his affidavit sets forth “[t]he terms and extent of the conversation” which occurred on that date (R-665).

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